



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

HD:hd
Docket No: 01697-00
4 August 2000

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: LCDR [REDACTED], USN, [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 2 Mar 00 w/attachments
(2) Counsel ltr dtd 14 Jun 00
(3) DODIG ltr dtd 16 Jun 99
(4) NAVIG N66 memo dtd 29 Dec 99 w/enclosures
(5) PERS-311 memo dtd 11 Apr 00
(6) PERS-85 memos dtd 23 Jun and 20 Jul 00
(7) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that her naval record be corrected by removing the fitness report for 1 November 1997 to 3 October 1998, a copy of which is at Tab A. She also requested removal of her failure of selection by the Fiscal Year (FY) 01 Line Commander Selection Board. In addition, she requested that she be granted a special selection board for FY 01 on the basis that her record before the regular board improperly included the contested fitness report. In her original application, she also asked this Board to recommend to the Secretary of the Navy that her recommendation for the Defense Meritorious Service Medal end of tour award be processed for consideration and approval. However, this request was not considered, as her counsel's letter at enclosure (2) reflects the matter will be handled without action by this Board. After the Board had considered Petitioner's case, the correspondence at enclosure (3) was received from the Department of Defense Inspector General. It indicates that her complaint under title 10 U.S.C. 1034 ("Military Whistleblower Protection Act"), alleging that the contested fitness report had been in reprisal for protected communications, was closed after a preliminary inquiry.

2. The Board, consisting of Messrs. Bishop, Pauling and Pfeiffer, reviewed Petitioner's allegations of error and injustice on 3 August 2000, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures less enclosure (3), naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Enclosure (1) was filed in a timely manner.

c. The contested fitness report is not adverse: the comments are entirely favorable, and the reporting senior marks Petitioner "Early Promote," the highest recommendation for promotion. However, the report reflects no mark of "5.0" (highest), while it does include four of "4.0" (second best) and two of "3.0" (third best), in blocks 34 ("Equal Opportunity") and 35 ("Military Bearing/Character").

d. Petitioner contends that her reporting senior took retributive action against her and others in the form of unwarranted low performance marks. She alleges that the contested fitness report was in reprisal for her testimony in the investigation of a complaint against the reporting senior under Article 138, Uniform Code of Military Justice. She further alleges that she was the victim of racial bias.

e. In support of her allegations, Petitioner cites the command climate assessment requested by the Naval Inspector General (NAVIG), at enclosure (4). In their cover letter at enclosure (4), NAVIG states "The command climate, under the [reporting senior]'s leadership, was assessed as being well below par, which will support petitioners' claims that many were unfairly treated in the evaluation process." Petitioner notes that in the NAVIG letter to her (Tab 11 to enclosure (1)), they further stated that "The inquiry partially substantiated [her] allegations," and they encouraged her to petition this Board for removal from her record of any adverse material that accrued during her tour at the command.

f. In correspondence attached as enclosure (5), the Navy Personnel Command (NPC) office having cognizance over officer fitness reports has commented to the effect that the contested fitness report should be removed on the basis of the command climate assessment at enclosure (4).

g. In correspondence attached as enclosure (6), the NPC office having cognizance over active duty officer promotions has commented to the effect that if the contested fitness report is removed, they would recommend both removing her failure of selection for promotion and granting her consideration by a special selection board. They stated that the fitness report would have been influential in the deliberations of her promotion board, and would have affected the competitiveness of her record among her peers.

CONCLUSION:

Upon review and consideration of all the evidence of record, and especially in light of the contents of enclosures (4), (5) and (6), the Board finds the existence of an injustice warranting the following corrective action:

RECOMMENDATION:

a. That Petitioner's naval record be corrected by removing therefrom the following fitness report and related material:

Date of Report	Reporting Senior	Period From	of Report To
98Oct01	XXXXXXXXXX USN	97Nov01	98Oct03

b. That there be inserted in Petitioner's naval record a memorandum in place of the removed report containing appropriate identifying data concerning the report; that the memorandum state that the report has been removed by order of the Secretary of the Navy in accordance with the provisions of federal law and may not be made available to selection boards and other reviewing authorities; and that such boards may not conjecture or draw any inference as to the nature of the report.

c. That Petitioner's record be corrected so that she be considered by the earliest possible selection board convened to consider officers of her category for promotion to commander as an officer who has not failed of selection for promotion to that grade.


d. That Petitioner be considered by a special selection board for the FY 01 Line Commander Selection Board.

e. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

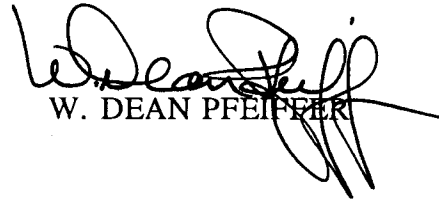
f. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

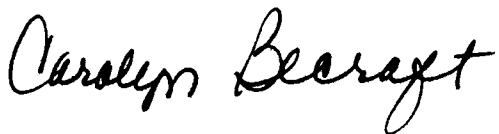
ROBERT D. ZSALMAN
Recorder


JONATHAN S. RUSKIN
Acting Recorder

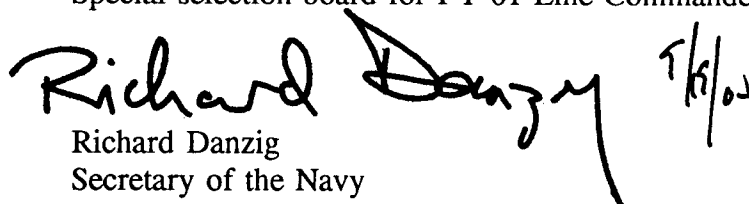
5. The foregoing report of the Board is submitted for your review and action.


W. DEAN PFEIFFER

Reviewed and approved:



Special selection board for FY 01 Line Commander Selection Board is approved:

 T/K/OJ
Richard Danzig
Secretary of the Navy



DEPARTMENT OF THE NAVY
NAVY PERSONNEL COMMAND
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

1697-00

1610
PERS-311
11 April 2000

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: PERS/BCNR Coordinator (PERS-00ZCB)

Subj: LCDR [REDACTED], USN [REDACTED]

Ref: (a) BUPERSINST 1610.10 EVAL Manual
(b) DON Inspector General's letter 50441 Ser N6/1582 of 9 September 1999

Encl: (1) BCNR File

1. Enclosure (1) is returned. The member requests the removal of her original fitness report for the period 1 November 1997 to 3 October 1998, removal of failure to select if not selected by the FY-01 Commander selection board, and process for consideration and approval for the Defense Meritorious Service Medal.

2. Based on our review of the material provided, we find the following:

a. A review of the member's headquarters record revealed the report in question to be on file. The member refused to sign the report and she did not indicate her desire to/not to submit a statement.

b. Lieutenant Commander [REDACTED] requests the removal of her fitness report because of the appearance of racial bias and discrimination. Evaluating a subordinate officer's performance and making recommendations concerning promotion and assignment are the responsibilities of the reporting senior. The duties are accomplished in the fitness report. In reviewing petitions that question the exercise of the reporting senior's evaluation responsibilities, we must determine if the reporting senior abused his/her discretionary authority. We must see if there is any rational basis to support the reporting senior's decisions, and whether the reporting senior actions were the result of improper motive. However, we must start from the position that the reporting senior exercised his/her discretion properly. Therefore, for us to recommend relief, the petitioner has to demonstrate that the reporting senior did not properly exercise his/her authority. The petitioner must show that the reporting senior acted for an illegal or improper purpose. The petitioner must do more than just assert the improper exercise of discretion; she must provide evidence to support the claim. I believe Lieutenant Commander [REDACTED] done so.

c. Based on reference (b), we believe the fitness report for the period 1 November 1997 to 3 October 1998 should be removed from Lieutenant Commander [REDACTED] record.

- d. The member proves the report to be unjust or in error.
- 3. We recommend removal of the fitness report in question.

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Head, Performance
Evaluation Branch

1697-00



DEPARTMENT OF THE NAVY
BUREAU OF NAVAL PERSONNEL
5720 INTEGRITY DRIVE
MILLINGTON TN 38055-0000

5420
Pers 85
23 Jun 00

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: Assistant for BCNR Matters (PERS-00ZCB)

Subj: LCDR [REDACTED], USN [REDACTED]

Ref: (a) PERS-311 Memo of 11 April 2000

Encl: (1) BCNR File

1. Enclosure (1) is returned, recommending approval of LCDR [REDACTED] request for removal of her failure of selection resulting from the FY-01 Active-Duty Commander Line Promotion Selection Board.

2. Reference (a) recommended removal of the fitness report in question. The presence of this fitness report would have been influential in the board's deliberations and would effect the competitiveness of [REDACTED]'s record amongst her peers.

[REDACTED]

Director, Officer Promotions and
Enlisted Advancements Division



DEPARTMENT OF THE NAVY
BUREAU OF NAVAL PERSONNEL
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MILLINGTON TN 38055-0000

5420
PERS-85
20 Jul 00

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Via: Assistant for BCNR Matters (PERS-00ZCB)

Subj: LCDR [REDACTED] U [REDACTED]

Ref: (a) PHONCON BCNR [REDACTED]/NPC-85 [REDACTED] of
20 Jul 00
(b) PERS-85 Memo of 23 June 2000
(c) PERS-311 Memo of 11 April 2000

1. Per reference (a), reference (b) should be amended to include a recommendation that [REDACTED] be granted a special selection board if the fitness report addressed in reference (c) is stricken from her record and her failure of selection resulting from the FY-01 Active-Duty Commander Line Promotion Selection board is removed.

[REDACTED]
[REDACTED]
[REDACTED]
BCNR Liaison, Officer Promotions
and Enlisted Advancements
Division